Nos. 86-735, 86-736, and 86-942

In the Supreme Court of the United States

OCTOBER TERM, 1986

ALLEGHENY ELECTRIC COOPERATIVE, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

METROPOLITAN TRANSPORTATION AUTHORITY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

RHODE ISLAND PUBLIC UTILITIES COMMISSION AND NEW JERSEY BOARD OF PUBLIC UTILITIES, CROSS-PETITIONERS

v.

METROPOLITAN TRANSPORTATION AUTHORITY, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the phrase "neighboring States" in the Niagara Redevelopment Act (NRA), 16 U.S.C. 836, refers solely to Pennsylvania and Ohio or instead refers to all states within "reasonable economic transmission distance" from the Niagara Power Project.

2. Whether Congress, in giving "public bodies" preference status for hydroelectric power under the NRA, intended to limit the preference to publicly owned entities that are capable of selling and distributing power directly to consumers of electricity at retail.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-28a)[1] is reported at 796 F.2d 584. The March 27, 1985, opinion of the Federal Energy Regulatory Commission (the Commission) (Pet. App. 58a-102a) is reported at 30 F.E.R.C. ¶ 61,323 (1985). The Commission's July 30, 1985, opinion on rehearing (Pet. App. 29a-57a) is reported at 32 F.E.R.C. ¶ 61,194 (1985).

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[1]"Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 86-735.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1986. A petition for rehearing was denied on August 6, 1986 (Pet. App. 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Niagara Redevelopment Act (the NRA), 16 U.S.C. 836 *et seq.*, the Commission issued a license to the Power Authority of the State of New York (PASNY) to construct and operate a power project—the Niagara Power Project (the Project)—utilizing the United States' share of water from the Niagara River. One of PASNY's principal functions is to allocate hydroelectric power generated by the Project. Pet. App. 9a. Under the NRA, PASNY, "in disposing of 50 per centum of the project power," is required to "give preference and priority to public bodies and nonprofit cooperatives within economic transmission distance" (16 U.S.C. 836(b)(1)). Furthermore, in allocating such power, PASNY is required to make a reasonable portion thereof—up to 20 percent (*i.e.*, 10 percent of the Project's total power)—"available for use within reasonable economic transmission distance in neighboring States" (16 U.S.C. 836(b)(2)).

2. The present litigation began in March 1980 when municipal companies in Massachusetts and Connecticut filed complaints with the Commission charging that PASNY had deprived them of their share of the preference power set aside for "neighboring States" under 16 U.S.C. 836(b)(2). In its answer, PASNY acknowledged that Massachusetts and Connecticut qualified as "neighboring States." PASNY indicated, however, that its decision not to sell preference power to those municipalities was permissible because it was already selling a "reasonable" portion of such power to customers outside of New York. PASNY further indicated that the Metropolitan Transportation Authority (MTA),

which is in charge of most mass transit in New York City, was purchasing a portion of the preference power that otherwise would have been sold out-of-state. The Commission consolidated the complaints and it permitted various entities, including the Vermont Department of Public Service (VDPS) and Allegheny Electric Co-operative, Inc. (Allegheny), to intervene in the proceedings. Allegheny's construction, as intervenor, was that "neighboring States" was intended to refer to Ohio and Pennsylvania. In February 1981, the Commission held that Massachusetts and Connecticut, not just Pennsylvania and Ohio, qualified as neighboring states. In addition, the Commission ordered an evidentiary hearing concerning the proper allocation of preference power among the neighboring states. Pet. App. 10a-13a.

On March 27, 1985, after the Administrative Law Judge (ALJ) had completed extensive hearings and had rendered a decision, the Commission entered an order affirming the ALJ in most respects (Pet. App. 15a, 58a-102a). The Commission held that neither the MTA nor the VDPS qualified for preference power because neither was a "public body" (*id.* at 75a-82a). According to the Commission, the term "public bodies" in the NRA means "publicly-owned entities that are capable of selling and distributing power directly to consumers of electricity at retail" (*id.* at 80a). Under that definition, MTA failed to qualify because it merely consumed power and did not distribute it; VDPS did not qualify because it did not distribute power itself but simply acted as a wholesale broker to private utilities and municipal systems (*id.* at 80a-82a).[2]

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[2]In reaching its decision with respect to VDPS, the Commission overruled, in relevant part, its prior decision in *Vermont Pub. Serv. Bd.* v. *Power Authority*, 55 F.P.C. 1109 (1976).

On the question of "neighboring States," the Commission reaffirmed its prior ruling that the phrase "neighboring States" was not limited to Pennsylvania and Ohio (Pet. App. 72a-75a). In the Commission's view (*id.* at 73a), "[b]y interpreting 'neighboring states' according to its usual meaning, we give full effect to Congress' desire to share the benefits of the Niagara project among preference customers throughout the region, but on a limited basis." While the Commission acknowledged that there were several references in the legislative history to Pennsylvania and Ohio, it noted that other states in the region were mentioned as well (*id.* at 74a).

On July 30, 1985, the Commission issued an order on rehearing affirming its March 27, 1985, opinion (Pet. App. 29a-57a).

3. The court of appeals affirmed (Pet. App. 3a-28a). In construing the phrase "public bodies," the court concluded—based on a survey of the legislative history—that Congress enacted the NRA's preference provisions so that municipalities would utilize their supply of hydropower "to charge rates which would force the private utilities to reduce their prices or at least serve as a measure by which regulators could set the private utilities' rate of return" (*id.* at 19a-20a). The court reasoned (*id.* at 20a) that such "[y]ardstick competition" could only be effective if the municipal competitor, like the private utility, actually resold electricity to ultimate consumers. If the public entity used the power itself or sold it to private utilities, the private utilities would face no pressure to reduce the prices they charged their customers (*ibid.*). Applying that interpretation of "public bodies," the court agreed with the Commission that neither MTA nor VDPS was eligible for preference power.[3]

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[3]The court (Pet. App. 23a-24a n.8) also rejected MTA's contentions that the Commission ignored mass transit considerations and violated the environmental laws by not classifying MTA as a preference customer. It noted (*id.* at 24a n.8) that the NRA does not require the

On the meaning of the phrase "neighboring States" under the NRA, the court concluded that there was "no evidence" that Congress intended that phrase "to have any meaning other than its literal one: states found to be within reasonable geographical proximity of New York, taking into account all relevant factors and whether they are within reasonable economic transmission distance" (Pet. App. 24a). The court reviewed the legislative history of the "neighboring States" provision and concluded that, in Congress's view, "economic transmission distances were mutable" (*id.* at 25a). The court noted (*ibid.*) that no congressman had suggested during the debates that preference power "should always be available only to those limited areas which happened to be within economic transmission distance in 1957 [when the NRA was enacted]." The court further cited statements by several congressmen that states other than Ohio and Pennsylvania could receive power if they were within economic transmission distance (*ibid.*). Thus, reasoned the court, since Massachusetts and Connecticut were "within reasonable geographical proximity of New York," the public bodies within those states qualified for preference power (*id.* at 24a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Review by this Court is therefore not warranted.

Commission "to ignore yardstick competition in favor of subsidizing mass transit * * *." In addition, it noted (*ibid.* (citation omitted)) that, on the environmental question, "Congress' intent controls [and in any event] if MTA's subways were permitted to buy the cheaper hydropower directly (rather than from a distributor of preference power), other customers would then be forced to use the more expensive fuel claimed to pollute the environment."

1. Petitioner Allegheny contends (86-735 Pet. 5-29) that the court of appeals and the Commission erred in holding that the phrase "neighboring States" under the NRA's preference provisions includes Massachusetts and Connecticut. According to Allegheny (*ibid.*), only the States of Pennsylvania and Ohio are encompassed within that phrase.

In the first place, Allegheny's interpretation is contrary to the plain language of the statute. Had Congress intended to designate Pennsylvania and Ohio as the exclusive out-of-state recipients of preference power, it could have—and presumably would have—done so.[4]

Moreover, the legislative history does not support Allegheny's position. As the court of appeals indicated (Pet. App. 25a), while Congress acknowledged that for a period of time only customers in western Pennsylvania and northeastern Ohio would receive preference power, no congressman stated that such power should always be available only to those limited areas. To the contrary, as the court noted (*ibid.*), members of Congress acknowledged that economic transmission distances were mutable.[5]

In sum, both the language and history of the NRA support the interpretation of "neighboring States" adopted by the Commission and the court of appeals.

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[4]As the Commission noted by way of contrast (Pet. App. 73a n.6), Section 5(c) of the Boulder Canyon Project Act, 43 U.S.C. 617d(c), explicitly specifies a preference for the States of Arizona, California, and Nevada.

[5]Allegheny's claim (Pet. 6) that the court of appeals "fail[ed] * * * to examine or analyze the legislative history presented to it" is patently without merit. As its opinion demonstrates (Pet. App. 24a-26a), the court conducted a thorough examination of the legislative history.

2. Petitioner MTA (86-736 Pet. 11-19) and cross-petitioners (86-942 Cross-Pet. 8-29) assert that the Commission and the court of appeals erred in restricting the phrase "public bodies" to those publicly owned entities that sell and distribute power to ultimate consumers. The court of appeals, however, found that the legislative history convincingly demonstrated that Congress intended the words "public bodies" to refer not to governmental units generally but to public entities that sell and distribute power at retail. As the court pointed out (Pet. App. 20a-21a), the term "public body" was treated in the legislative history as being synonymous with such terms as "municipal utility" or "municipal plant." Moreover, throughout the congressional debates it was implicit that "public bodies" were public entities capable of distributing power (*id.* at 21a). In addition, Congress's purpose in adopting the preference provisions was to promote "[y]ardstick competition." As the court pointed out (*id.* at 19a-20a), such competition would not exist if the public entity used the preference power itself or simply resold it to privately owned utilities. Since the more expansive interpretation of "public bodies" urged by petitioner MTA and the cross-petitioners would contravene Congress's intent, the Commission and the court of appeals properly rejected it.[6]

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[6]MTA errs in asserting (86-736 Pet. 16-17) that the economic pressure of yardstick competition "is of no value today" and that such competition therefore should not have been relied upon by the court of appeals in construing the statute. Such an argument is properly addressed to Congress, not the courts. There is likewise no merit to MTA's argument that the Commission improperly ignored mass transit and environmental considerations. As the court of appeals recognized (Pet. App. 23a-24a n.8), the NRA does not require the Commission "to ignore yardstick competition in favor of subsidizing mass transit" or to classify MTA as a public body in order to promote environmental interests.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1987